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8 KRISTEN A. JANULEWICZ, RECEIVER

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11

12 KRISTEN A. JANULEWICZ, RECEIVER,

13 Plaintiff,

14 v.

15 PRIVATE PLACEMENT CAPITAL NOTES
II, LLC; ANTHONY (TONY) HARTMAN;
16 and DOES 1 through 10, inclusive,

17 Defendants.
18

Case No. **'16CV0578 BEN DHB**

COMPLAINT FOR DAMAGES AND
DECLARATORY RELIEF

19 Plaintiff Kristen A. Janulewicz (the "Receiver"), the Court-appointed
20 permanent receiver for Total Wealth Management, Inc. ("Total Wealth"), and its
21 subsidiaries and affiliates, including but not limited to Altus Capital Management,
22 LLC (collectively, the "Receivership Entities" or "Entities"), hereby brings the
23 following Complaint against the above-captioned Defendants and, on behalf of the
24 Receivership Entities, alleges as follows:

25 **JURISDICTION AND VENUE**

26 1. This Court has jurisdiction over this matter under 28 U.S.C. Sections
27 1345 and 1367(a), and the doctrines of ancillary and supplemental jurisdiction, in
28 that this action arises from a common nucleus of operative facts as, and is

1 substantially related to the original claims in, the Securities and Exchange
 2 Commission's (the "Commission") pending enforcement action styled *SEC v. Total*
 3 *Wealth Management, Inc., et al.*, USDC, S.D. Cal. Case No. 15-cv-226 BAS (DHB)
 4 (the "Enforcement Action").

5 2. This Court may exercise personal jurisdiction over the above-captioned
 6 Defendants pursuant to Federal Rule of Civil Procedure 4(k)(1)(A).

7 3. Venue in the Southern District of California is proper under 28 U.S.C.
 8 Section 1391 because this action is an ancillary proceeding to the Enforcement
 9 Action and because the Receiver was appointed in this District pursuant to the
 10 Court's previously entered "(1) Preliminary Injunction, Appointment of a Permanent
 11 Receiver, and Related Orders; and (2) Order Vacating Hearing on Preliminary
 12 Injunction" (the "Appointment Order"), which specifically authorized the Receiver
 13 "to institute, pursue, and prosecute all claims and causes of action of whatever kind
 14 and nature which may now or hereafter exist as a result of the activities of" the
 15 Receivership Entities.

16 PARTIES

17 4. The Receiver is the duly appointed permanent receiver for the
 18 Receivership Entities. The Entities include, but are not limited to, Total Wealth
 19 Management, Inc. ("Total Wealth"); Altus Capital Management, LLC ("Altus
 20 Capital"); Altus Capital Opportunity Fund ("ACOF"); and the so-called Altus Series
 21 Funds: Altus Focused Growth Portfolio Series, LP, Altus Income Portfolio Series,
 22 LP; Altus Conservative Portfolio Series, LP; Altus Moderate Growth Portfolio
 23 Series, LP; Altus Moderate Portfolio Series, LP; and Altus Growth Portfolio Series,
 24 LP (together with ACOF, the "Altus Funds"). Altus Capital is the general partner of
 25 the Altus Funds, and Total Wealth is their investment adviser. Among other things,
 26 the Appointment Order calls for the Receiver to recover and marshal, for the benefit
 27 of creditors and investors in the Receivership Entities, any and all assets which were
 28 owned, leased, occupied, or otherwise controlled by the Receivership Entities, or

1 were otherwise purchased with assets of the Receivership Entities. The Receiver
2 holds exclusive authority and control over the assets of the Receivership Entities,
3 including over the causes of action alleged herein, over which this Court has
4 ancillary and supplemental jurisdiction.

5 5. On information and belief, Defendant Private Placement Capital Notes
6 II, LLC ("PPCN") is a Colorado limited liability company, formed in 2008, with its
7 principal place of business listed as 8547 East Arapahoe Road, J192, Greenwood
8 Village, Colorado 80112 (the "PPCN Address"). The PPCN Address is a mail drop-
9 box, not a physical office, and no PPCN personnel or records are located at the
10 PPCN Address.

11 6. On information and belief, Defendant Anthony (Tony) Hartman, an
12 individual who was the subject of a 2011 securities fraud consent order in the State
13 of Colorado, is PPCN's principal and a resident of Colorado and Texas. As detailed
14 below, and on information and belief, Defendant Tony Hartman is an alter-ego of
15 PPCN.

16 7. The Receiver is ignorant of the true names and capacities, whether
17 individual, corporate, associate or otherwise, of Doe Defendants 1 through 10,
18 inclusive. On information and belief, each fictitiously named Defendant was in
19 some way responsible for, participated in or contributed to the matters and things
20 complained of herein, and in some fashion, has legal responsibility therefor. When
21 the identity and exact nature of such fictitious Defendants' responsibility for,
22 participation in and contribution to the matters and things herein alleged is
23 ascertained, the Receiver will seek leave to amend this Complaint and all
24 proceedings herein to set forth the nature of these fictitious Defendants' identities.

FACTUAL ALLEGATIONS

I. The Establishment Of The Receivership Entities And Their Loan Investment Activities.

8. As alleged by the Commission in the Enforcement Action, Total Wealth registered as an investment adviser with the Commission in 2009. Total Wealth's sole owner and chief executive officer was Jacob Cooper ("Cooper"), an individual Defendant in the Enforcement Action.

9. In late 2009, Cooper organized ACOF to allow Total Wealth's investor clients to pool their money to invest in securities and other investments, and to meet the mandatory minimum investment requirement for investment funds for which they might not otherwise qualify.

10. In 2011, Cooper established the Altus Funds. As with ACOF, the purpose of the Altus Funds was to allow investor clients to pool their money to invest in securities and other investments, and to meet the mandatory minimum investment requirement for investment funds for which they might not otherwise qualify.

11. The Altus Funds invested in a variety of different investments, including at least: (1) Life's Good, Inc., which was determined by the United States District Court for the Eastern District of Pennsylvania to be a Ponzi-like investment scheme and its principal, Robert Stinson, Jr., a recidivist offender, sentenced to 33 years in prison; (2) Aegis Holding Company, Aegis Atlantic, and Aegis Retail (collectively "Aegis"), in connection with which the Altus Funds experienced losses in excess of \$18 million; and (3) PPCN, into which the Altus Funds invested at least \$24,000,000, in the aggregate, in the form of promissory notes. The Altus Funds made their investments, again, in the form of loans memorialized by promissory notes, in PPCN from approximately December 2007 to February 2014.

12. On information and belief, the Altus Funds' investment in PPCN constitutes at least 70% of all funds invested in PPCN. On information and belief,

1 the Receivership Entities were insolvent at the time the Altus Funds invested in
2 PPCN, or were rendered insolvent by their investment.

3 **II. PPCN's Solicitation Of Investment From The Altus Funds.**

4 13. PPCN solicited investments through a variety of means, including the
5 dissemination of Private Placement Memoranda ("PPMs") and other written
6 solicitations. These PPMs and solicitations were provided to Cooper, Total Wealth,
7 and the Altus Funds in order to solicit investment from the Altus Funds.

8 14. On information and belief, in its PPMs and other written solicitations,
9 PPCN represented that its business consisted of making commercial hard money
10 loans, or "bridge loans," as well as short-term investments, and the acquisition of
11 distressed and commercial real property, and loans sold by the Federal Deposit
12 Insurance Corporation.

13 15. On information and belief, in written solicitations provided to Cooper,
14 Total Wealth, and the Altus Funds, PPCN represented that all loans made by PPCN
15 were backed by collateral valued in the amount of at least 200% of the value of its
16 loans.

17 16. On information and belief, PPCN further represented to Cooper, Total
18 Wealth, and the Altus Funds that its real estate and other holdings included, among
19 other things, a resort known as Melrose on the Beach (the "Melrose Resort"), a
20 distressed golf resort on Daufuskie Island, off the coast of South Carolina, and Good
21 Earth Minerals LLC ("GEM"), a start-up mining enterprise in Utah. In an interview
22 with the Receiver on or around early March 2015, Defendant Hartman indicated to
23 the Receiver that PPCN owned equity interests in the Melrose Resort and GEM.

24 17. As described in the PPMs, investments in PPCN were accomplished
25 through the purchase of notes (the "Notes"), styled as promissory notes. The Altus
26 Funds entered into at least 221 Notes with PPCN. The PPMs and other written
27 solicitation materials delivered to Total Wealth and the Altus Funds provided that
28 the Notes would bear interest at an annual rate of 12.5%, to be paid semi-annually.

18. The Notes, again, styled as promissory notes, further provided that they would have a term of 5 years from the date of purchase, after which note holders (investors) could redeem the Notes for a full repayment of principal.

19. Notably, however, the Notes further provided that, within 6 months of receipt of a redemption request, PPCN would have to exercise only "diligent efforts" to repay any outstanding principal, and then only to the extent that PPCN had actually made money from its lending or other investment activities.

III. PPCN's Investment Holdings.

20. On information and belief, despite the fact that it raised investments in the aggregate amount of more than \$24,000,000 from the Altus Funds, the income derived from PPCN's investments was insufficient to satisfy PPCN's promise to pay investors, including the Altus Funds, annual interest at a rate of 12.5%.

21. On information and belief, PPCN does not directly own an equity interest in the Melrose Resort. Instead, PPCN owns a partial interest in a limited liability company that itself holds a fractional interest in the Melrose Resort.

22. On information and belief, PPCN does not own directly own an equity interest in GEM, but, as with the Melrose Resort, owns only a fractional or contingent, limited interest in GEM.

IV. PPCN's Payment Of Interest And The Receiver's Redemption Request.

23. As detailed above, while PPCN appears to have made some bridge loans, the income derived from such loans, if any, is insufficient to satisfy PPCN's interest payment obligations to investors, including the Altus Funds. Nonetheless, PPCN has paid and credited interest to the Altus Funds, characterized as returns on investment. Notably, however, PPCN has made no interest payments to the Altus Funds since December 2014, which payment was additionally only a fraction of the interest owed at that time.

1 24. On information and belief, the Melrose Resort is not generating any net
2 income. In other words, it is a "negative cash flow" business, meaning that PPCN's
3 interest in the Melrose Resort is likewise not generating any net income.

4 25. On information and belief, despite the fact that the Melrose Resort is a
5 "negative cash flow" business, and not generating any net income, PPCN has paid
6 and credited interest to the Altus Funds, characterized as returns on investment.

7 26. On information and belief, while GEM had secured permits to
8 commence mining operations, no operations have commenced. Accordingly, GEM
9 is, on information and belief, likewise not generating any net income, and represents
10 another "negative cash flow" business. Nonetheless, PPCN has paid and credited
11 interest to the Altus Funds, characterized as returns on investment.

12 27. On information and belief, PPCN has paid the Altus Funds a total of
13 approximately \$4,570,000 in interest and has credited the Altus Funds with at least
14 an additional \$11,200,000 in interest, meaning that such interest was not actually
15 paid, but merely added to the balance of the Altus Funds' investments. As of the
16 date of this Complaint, PPCN reports that the value of the Altus Funds' investment
17 via the Notes, including such credited interest, is at least \$34,100,000, in the
18 aggregate.

19 28. On information and belief, at least \$4,500,000 of the interest paid to the
20 Altus Funds from 2012 through 2014, and characterized by PPCN as return on
21 investment, was paid from funds obtained by PPCN from later, non-Altus Fund
22 investors. In this sense, PPCN's interest payment practices are suggestive of a
23 Ponzi-like investment scheme in that they reflect the payment of interest to older
24 investors from funds obtained from newer investors.

25 29. On information and belief, PPCN failed to disclose to Total Wealth and
26 the Altus Funds the adverse financial condition of its investments and made material
27 misrepresentations regarding the value of its investments.

28

1 30. On information and belief, PPCN failed to adequately disclose the risks
2 associated with the majority of its investment holdings, which, contrary to its stated
3 goals, consisted principally of highly speculative and/or fractional interests in
4 various investments.

5 31. In accordance with the terms of the Notes, the Receiver sent PPCN and
6 its counsel a written redemption request relating to at least \$16,000,000 in Notes
7 that had reached or exceeded their 5-year maturity horizon. As of the date of this
8 Complaint, PPCN has failed to respond to the Receiver's redemption request and has
9 not returned any of the requested amount to the Receiver.

10 **V. PPCN Is Defendant Hartman's Alter-Ego.**

11 32. On information and belief, Defendant Tony Hartman diverted PPCN
12 funds or assets in a manner undisclosed to PPCN's investors and for his own benefit.
13 Among other things, on information and belief, between January 2009 and February
14 2015 Defendant Hartman caused PPCN to transfer at least \$312,000 to entities
15 wholly owned and controlled by Defendant Hartman. This diversion of funds was
16 damaging to PPCN's investors and creditors, including the Altus Funds.

17 33. On information and belief, PPCN did not maintain adequate corporate
18 records to support its actions.

19 34. On information and belief, and as evidenced by PPCN filings with the
20 Commission, Defendant Hartman is the beneficial owner, Executive Officer, and
21 Managing Partner of PPCN. As such, Defendant Hartman exercised full dominion
22 and control over PPCN and its operations, with no significant oversight.

23 35. On information and belief, Defendant Hartman is the only director,
24 manager, or executive officer of PPCN.

25 36. On information and belief, PPCN is severely undercapitalized as a
26 consequence of, in part, its interest-payment practices, as directed by Defendant
27 Hartman, when compared to the significant liabilities owed by PPCN to its investors
28 and/or creditors, including the Altus Funds. Indeed, in or about March 2015,

1 Defendant Hartman represented to the Receiver that PPCN had insufficient cash on
2 hand to meet an existing equity investment obligation.

3 37. On information and belief, Defendant Hartman deliberately failed to
4 disclose funds transfers made by PPCN to entities under his control, or for his own
5 personal benefit.

6 38. As a consequence of the above, and other facts to be discovered, there
7 exists a sufficient unity of interest between PPCN and Defendant Hartman such that
8 the separate personalities of the two do not exist, and it would be inequitable to treat
9 the actions of PPCN as those of PPCN alone.

10 **COUNT I – FRAUD**

11 **(as against all Defendants)**

12 39. The Receiver incorporates herein each and every allegation contained
13 in Paragraphs 1 through 38, inclusive, set forth above.

14 40. On information and belief, PPCN and Defendant Hartman made false
15 representations to Total Wealth and the Altus Funds about material facts in order to
16 induce them to invest in PPCN. On information and belief, these material
17 misrepresentations included, but are not limited to:

18 a. Claiming that PPCN's principal business consisted principally of
19 making bridge loans;

20 b. Claiming that PPCN's bridge loans were backed by collateral
21 valued at 200% of the value of the loans;

22 c. Claiming that PPCN's bridge loans and other business and
23 investments, including the Melrose Resort and GEM investments, generated an
24 income stream sufficient to satisfy its 12.5% annual interest payment obligations on
25 the Notes, along with the return of all principal;

26 d. Claiming that PPCN would return its investors' principal upon
27 the maturity of their Notes, upon written request; and
28

1 e. Claiming that interest paid to investors, including the Altus
2 Funds, reflected returns on investment, rather than payments received from newer
3 investors or new debt.

4 41. On information and belief, PPCN and Defendant Hartman knew the
5 representations, including those specifically identified in Paragraph 40, above, to be
6 false.

7 42. On information and belief, PPCN and Defendant Hartman made the
8 false representations, including those specifically identified in Paragraph 40, above,
9 intentionally, with the intention that they would be acted upon, and in order to
10 defraud the Altus Funds, including by causing them to invest in PPCN.

11 43. On information and belief, Total Wealth and the Altus Funds were
12 ignorant of the falsity of these representations and justifiably and reasonably relied
13 on the false representations of PPCN and Defendant Hartman, and based on those
14 representations the Altus Funds invested at least \$24,000,000 with PPCN.

15 44. On information and belief, the Altus Funds, as a result of their and
16 Total Wealth's reasonable reliance on PPCN's and Defendant Hartman's false
17 representations, have suffered damages in the amount of at least approximately
18 \$20,000,000, as a consequence of their investment in PPCN, in an amount to be
19 proven at trial.

20 **COUNT II – BREACH OF CONTRACT**

21 **(as against PPCN)**

22 45. The Receiver incorporates herein each and every allegation contained
23 in Paragraphs 1 through 44, inclusive, set forth above.

24 46. The Notes represent contracts between the Altus Funds and PPCN.
25 Specifically, the Notes memorialize an agreement by the Altus Funds to invest in
26 PPCN in exchange for the payment of 12.5% annual interest, to be paid semi-
27 annually, and the return of all outstanding principal and interest upon the maturity of
28 the Notes. Section II of the Notes provides, in pertinent part, that "Interest shall be

1 payable under this Note semi-annually, on the first business day after January 15
2 and July 15 of each calendar year during the term hereof. The amount of interest
3 payable hereunder shall be up to 12.5% per annum." Section IV of the Notes
4 provides, in pertinent part, that "[t]his Note has a term of five years from the date
5 first set forth above. After the term, always subject to the provisions of Section III
6 above, all amounts due hereunder, including interest, will be due and payable within
7 six months after the date that Maker [PPCN] receives a written payoff request from
8 Holder[.]" A true and correct, redacted copy of a Note substantially identical to the
9 other Notes is appended hereto as **Exhibit A**, and incorporated herein by reference.

10 47. On information and belief, despite its interest payment obligations,
11 PPCN has failed to make any interest payments whatsoever to the Altus Funds since
12 at least December 2014, and has breached its contractual obligations.

13 48. The Altus Funds have performed all of their obligations under the
14 Notes.

15 49. As reflected in Paragraph 31, above, the Receiver issued a written
16 redemption request to PPCN for at least \$16,000,000 in matured Notes. As of the
17 date of this Complaint, PPCN has failed to make any payment to the Receiver in
18 accordance with the terms of the Notes and the Receiver's redemption request, and
19 has accordingly breached its contractual obligations.

20 50. As a consequence, the Altus Funds have suffered damages in the
21 amount of at least \$16,000,000, in an amount to be proven at trial.
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COUNT III – UNJUST ENRICHMENT

(as against all Defendants)

51. The Receiver incorporates herein each and every allegation contained in Paragraphs 1 through 50, inclusive, set forth above.

52. As described in more detail above, the Altus Funds invested at least \$24,000,000 in PPCN, in reliance on false representations from PPCN and Hartman regarding PPCN's business and investment activities, conferring a benefit upon PPCN and Defendant Hartman, at the expense of the Altus Funds, of which approximately \$4 million was paid back, as purported interest.

53. PPCN did not receive the Altus Funds' investment in good faith, and the Altus Funds received no equivalent value or consideration in exchange for their investment.

54. The outstanding, aggregate balance owed by PPCN to the Altus Funds under the Notes, inclusive of interest, is at least \$34,100,000.

55. PPCN and its alter-ego, Defendant Hartman, have been unjustly enriched in the amount of at least approximately \$20,000,000, in an amount to be proven at trial, which amount is subject to immediate disgorgement to the Receiver.

COUNT IV – DECLARATORY RELIEF

(as against PPCN)

56. The Receiver incorporates herein each and every allegation contained in Paragraphs 1 through 55, inclusive, set forth above.

57. An actual controversy has arisen and now exists between the Altus Funds and PPCN concerning their respective rights and duties in connection with the Notes, especially since PPCN and Defendant Hartman have ignored the Receiver's pending redemption request, the terms of certain of the Notes are as yet unexpired, and PPCN continues to retain the Altus Funds' money. The Altus Funds contend that their investment in PPCN, as memorialized by the Notes, occurred on the basis of false representations and a false and illusory repayment promise, such

1 that PPCN effectively excused itself from ever making an actual repayment on the
 2 Notes, meaning the Notes were entered into without consideration. On information
 3 and belief, PPCN disputes this contention.

4 58. The Receiver, on behalf of the Altus Funds, therefore desires a judicial
 5 determination that the Notes are subject to rescission and that all funds invested by,
 6 and due and owing to, the Altus Funds in connection with the Notes should be
 7 immediately disgorged to the Receiver.

8 **COUNT V – DECLARATORY RELIEF**

9 **(as against all Defendants)**

10 59. The Receiver incorporates herein each and every allegation contained
 11 in Paragraphs 1 through 58, inclusive, set forth above.

12 60. An actual controversy has arisen and now exists between the Altus
 13 Funds, on the one hand, and PPCN and Defendant Hartman, on the other hand,
 14 concerning the issue of whether Defendant Hartman is the alter-ego of PPCN, given
 15 his use of PPCN funds for his personal benefit, PPCN's undercapitalization, and the
 16 other factors identified in Paragraphs 32 through 38, above.

17 61. The Receiver, on behalf of the Altus Funds, therefore desires a judicial
 18 determination that the Defendant Hartman is the alter-ego of PPCN and,
 19 accordingly, that Defendant Hartman is jointly and severally liable to the Receiver,
 20 on behalf of the Altus Funds, for any and all damages suffered by the Altus Funds,
 21 and for all amounts owed to the Altus Funds arising from or in connection with their
 22 investment in PPCN.

23 **COUNT VI – FRAUDULENT TRANSFER**

24 **(as against PPCN)**

25 62. The Receiver incorporates herein each and every allegation contained
 26 in Paragraphs 1 through 61, inclusive, set forth above.

27 63. On information and belief, the Altus Funds invested, in the aggregate,
 28 more than \$24 million in PPCN.

64. On information and belief, neither the Altus Funds specifically nor the Receivership Entities generally received any reasonably equivalent value in exchange for their investment.

65. On information and belief, at the time the Altus Funds invested in PPCN, they were engaged in or about to engage in business or transactions for which their remaining assets were unreasonably small in relation to the business or transaction.

66. On information and belief, at the time the Altus Funds invested in PPCN, the Altus Funds specifically, and the Receivership Entities generally, were or became insolvent.

67. On information and belief, at the time the Altus Funds invested in PPCN, the Altus Funds specifically, and the Receivership Entities generally, intended to incur, or believed or reasonably should have believed that they would incur debts beyond their ability to pay as they became due. Accordingly, the Altus Funds' investments in PPCN affirmatively hindered, delayed, and defrauded their collective creditors.

PRAYER FOR RELIEF

WHEREFORE, the Receiver prays for judgment against Defendants as follows:

On Count I:

(a) For a judgment against Defendants PPCN and Hartman, jointly and severally, in an amount of at least \$20,000,000, plus punitive damages, which amounts may be amended based on proof at trial; and

(b) For such other and further relief as the Court may deem proper.

On Count II:

(a) For a judgment against Defendant PPCN in an amount of at least \$16,000,000, which amount may be amended based on proof at trial; and

(b) For such other and further relief as the Court may deem proper.

1 **On Count III:**

2 (a) For a judgment against Defendants PPCN and Hartman, jointly and
3 severally, in an amount of at least \$20,000,000, which amount may be amended
4 based on proof at trial;

5 (b) For an order directing Defendants PPCN and Hartman to immediately
6 disgorge to the Receiver the amount of all funds they received from the Altus Funds,
7 in and amount of at least \$20,000,000, which amount may be amended based on
8 proof at trial, plus prejudgment interests and costs; and

9 (c) For such other and further relief as the Court may deem proper.

10 **On Count IV:**

11 (a) For a judgment declaring all Notes held by the Altus Funds to be
12 rescinded; and

13 (b) For an order directing Defendant PPCN to immediately disgorge to the
14 Receiver the amount of all funds originally invested pursuant to the Notes, and due
15 and owing thereunder, in and amount of at least \$20,000,000, which amount may be
16 amended based on proof at trial, plus prejudgment interests and costs; and

17 (c) For such other and further relief as the Court may deem proper.

18 **On Count V:**

19 (a) For a judgment declaring Defendant Hartman to be the alter-ego of
20 PPCN and, accordingly, jointly and severally liable to the Receiver for any and all
21 damages and other amounts owed by PPCN; and

22 (b) For such other and further relief as the Court may deem proper.

23 **On Count VI:**

24 For a judgment against Defendant PPCN in an amount of at least
25 \$20,000,000, which amount may be amended based on proof at trial;

26 (b) For an order directing Defendant PPCN immediately to disgorge to the
27 Receiver the amount of all funds it received from the Altus Funds, in and amount of
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1 at least \$20,000,000, which amount may be amended based on proof at trial, plus
2 prejudgment interests and costs; and

3 (c) For such other and further relief as the Court may deem proper.
4

5 Dated: March 7, 2016

6 ALLEN MATKINS LECK GAMBLE
7 MALLORY & NATSIS LLP
8 DAVID R. ZARO
9 JOSHUA A. DEL CASTILLO
10 KENYON HARBISON

11 By: /s/ Kenyon Harbison

12 KENYON HARBISON
13 Attorneys for Plaintiff
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